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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 436

FEDERAL TRADE COMMISSION,
PETITIONER,

vs.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief For The American Hospital And Life Insurance Company

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INDEX

Pages

Statement 1

Summary of Argument 2

Argument:

1. In the McCarran-Ferguson Act the word "regulation" is used in its ordinary sense and is synonymous to "control" 3

2. The McCarran- Ferguson Act vests the exclusive regulation and control of the insurance business in the several States 5

3. As to the business of insurance the jurisdiction of the Federal Trade Commission is restricted to such area of such business as is not regulated by State law 7

4. Under the McCarran-Ferguson Act the power of the State to regulate the business of insurance comes into being by the enactment of the regulatory State law, and such power is not suspended during the interim between the enactment of the State law and the enforcement of such law, nor is it dependent upon the extent to which such State law is actually enforced. If such State laws are not enforced to the satisfaction of the Congress, the Congress has the power at any time to occupy the field and vest the regulatory power in a Federal agency to the exclusion of regulation by the several States 9

Conclusion 32

Appendix "A" 33

INDEX OF AUTHORITIES

Chamber of Commerce of Minneapolis vs. Federal Trade Commission, 1926, 13 Fed. (2) 673 11

Ex Parte Collett, 337 U.S. 55, 61 30

Prudential vs. Benjamin, 328 U.S. 408 ....7, 18, 30

U.S. vs. Southeastern Underwriters, 322 U.S. 533 ..3

United Corporation vs. Federal Trade Commission, 1940, 110 Fed. (2) 473 11

U.S. Code, Title 15, Section 1011 .....4, 5, 29

U.S. Code, Title 16, Section 824 29

House Report No. 143, Feb. 13, 1945, U.S. Code Congressional Service, 79th Congress, First Session, 1945, pages 670-673 20

U.S. Code Congressional Service, 80th Congress, First Session 1947, Page 1359 31

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Brief For The American Hospital And Life Insurance Company

STATEMENT

In addition to the facts set out on pages 11 and 12 of Petitioner's brief, it is appropriate to state that no issue is made by Petitioner of the fact that the acts complained of in this case consist solely of the presentation within the boundaries of a State to prospects within that particular State by an agent

who has a license in that particular State. There is no instance of an agent crossing State lines in order to make such face to face presentation to a prospect. Neither is any issue made by Petitioner of the fact that Respondent sends no advertising by mail to prospects, does no newspaper, magazine, radio or television advertising.

SUMMARY OF ARGUMENT

1. In the McCarran-Ferguson Act the word "regulation" is used in its ordinary sense and is synonymous to "control."

2. The McCarran-Ferguson Act vests the exclusive regulation and control of the insurance business in the several States.

3. As to the business of insurance the jurisdiction of the Federal Trade Commission is restricted to such area of such business as is not regulated by State law.

4. Under the McCarran-Ferguson Act the power of the State to regulate the business of insurance comes into being by the enactment of the regulatory State law, and such power is not suspended during the interim between the enactment of the State law and the enforcement of such law, nor is it dependent upon the extent to which such State law is actually enforced. If such State laws are not enforced to the satisfaction of the Congress, the Congress has the

power at any time to occupy the field and vest the regulatory power in a Federal agency to the exclusion of regulation by the several States.

IN THE McCARRAN-FERGUSON ACT THE WORD "REGULATION" IS USED IN ITS ORDINARY SENSE AND IS SYNONYMOUS TO "CONTROL".

Respondent wishes to emphasize at the outset that both in **Southeastern** and in the McCarran-Ferguson Act the word "regulation" is used in its ordinary sense and is synonymous to the word "control". The word "regulate" is defined in Webster's New International Dictionary "To govern or direct according to rule as laws which regulate the succession of seasons; more narrowly to bring under the control of law or constituted authority."

The first two sentences of this Court's opinion in Southeastern are:

> "For 75 years this Court has held whenever the question has been presented, that the commerce clause of the Constitution does not deprive the individual States of the power to regulate and tax specific activities of foreign insurance companies which sell policies within their territories. Each State has been held to have this power even though negotiations and execution of the companies' policy contracts involve communications of information of persons, monies and papers across State lines."

Throughout the decision it is made plain that during such 75 years the control by the States of insurance business was exclusive and absolute unless some phase of such business violated some other portion of the Constitution than the commerce clause. The entire context of the McCarran-Ferguson Act clearly manifests that it was the intent of the Congress to continue such regulation (control) of the business of insurance by the several States as that business had been controlled prior to Southeastern. It is first stated:

> "That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> "Section 2-a. The business of insurance and every person engaged therein shall be **subject to the laws** of the several States which relate to the regulation or taxation of such business." (Emphasis ours)

It is too plain for argument that when anyone is subject to the laws of the several States that one is **controlled** by such laws.

> "Section 2-b. No Act of Congress shall be construed to invalidate, impair or supersede any laws enacted by any State for the purpose of regulating the business of insurance or which imposes a fee or tax upon such business unless such Act specifically relates to the business of insurance."

Then follows the proviso which we quote insofar as it is pertinent to this case:

> "The Federal Trade Commission Act as amended shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

Respondent submits that the clear meaning of such proviso is "the Federal Trade Commission Act as amended shall be applicable to the business of insurance **only** to the extent that such business is not **controlled** by State law."

THE McCARRAN-FERGUSON ACT VESTS THE EXCLUSIVE REGULATION AND CONTROL OF THE INSURANCE BUSINESS IN THE SEVERAL STATES.

With all due respect to counsel for Petitioner, Respondent does not hesitate to assert that Petitioner's position throughout its brief upon which it must stand or fall, that Congress intended a joint control of advertising by the Federal Trade Commission and the Insurance Commissioners of the 48 States is completely fallacious.

Even within the Commission itself there were sharply diverse conclusions as to the advertising complained of in this case. The Trial Examiner, after holding an extensive hearing on the matter, reached this conclusion:

> "The allegations of the complaint charging the Respondent with making false and mis-

leading statements and misrepresentations with respect to the terms and conditions of its policies in general, or with respect to the terms and conditions of specific policies, have not been established by substantial reliable probative evidence. Accordingly it cannot be found that the Respondent has violated the Federal Trade Commission Act by engaging in unfair and deceptive acts and practices in commerce to the prejudice and injury of the public. Therefore

"It is Ordered that the complaint herein be and the same is hereby dismissed." (R. page 58)

On appeal to itself from this order of dismissal the Federal Trade Commission found:

"The aforesaid acts or practices of Respondent as above set forth are all to the prejudice and injury of the public and constitute unfair and deceptive acts or practices within the intent and meaning of the Federal Trade Commission Act." (R. page 67)

It is certainly conceivable that the State Insurance Commissioners would agree with the conclusions of the Hearing Examiner rather than the contrary conclusions reached by the Commission. Petitioner takes the unique position that inasmuch as the Federal Trade Commission Act and the Acts of the Legislatures of the several States on the same subject are substantially the same, that on issues of fact as to whether certain material constitutes false and deceptive advertising the Commissioners of the 48 States and the Federal Trade Commission would always

reach the same conclusion. Petitioner's position certainly does not coincide with the obviously correct statement of this Court in **Prudential vs Benjamin** in which this Court, after setting out the obvious purpose of Congress in broadly giving support to the existing and future State systems for regulating and taxing the business of insurance, stated:

> "Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of the State systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted."

AS TO THE BUSINESS OF INSURANCE THE JURISDICTION OF THE FEDERAL TRADE COMMISSION IS RESTRICTED TO SUCH AREA OF SUCH BUSINESS AS IS NOT REGULATED BY STATE LAW.

Respondent's position is that Petitioner's jurisdiction over the regulation of the business of insurance is residuary and is restricted to such phase of the business, if any, that is not regulated by State law. As Respondent understands it, it is only incumbent upon Respondent to show to the satisfaction of this Court that under the McCarran-Ferguson Act Petitioner has no jurisdiction of the matter complained of by Petitioner in this case. It is not incumbent upon Respondent to establish that there are no types of advertising over which Petitioner might have jurisdiction.

No issue is made by the Petitioner of the fact that the acts complained of in this case consist solely of the presentation within the boundaries of a State to prospects within that particular State by the agent who has a license in that particular State. That there is no instance of an agent crossing a State line in order to make such face to face presentation to a prospect. Neither is any issue made by Petitioner of the fact that Respondent does no mail advertising to prospects or of the fact that Respondent does no newspaper, radio, television or magazine advertising. Therefore, we do not have any question in this case of radio or television advertising going out from the home office in San Antonio and being heard and seen by those who reside in other States in which Respondent does business with the resulting question as to whether these other States could prevent broadcasts from being made in San Antonio. Nor do we have any question of advertising being sent from San Antonio, Texas, to prospects in the other States with the resulting question as to whether these other States could prevent such mailed matter from being deposited in the mail in San Antonio, Texas, addressed to persons in the other States, nor do we have any newspaper or magazine advertising originating from copy supplied in San Antonio, Texas, with such newspapers and magazines reaching those residing in other States and being read by them with the resulting question as to whether these other States could prevent such copy from being promulgated from San

Antonio, Texas, and transmitted through the United States mails to be read by people residing in other States. Nowhere in the complaint is there any charge or even intimation that Respondent is threatening or intends to engage in any mail, radio, television, newspaper or magazine advertising in the future. The Petitioner charges only in paragraph 2 of its complaint, that in the States in which Respondent does business "the business of insurance is not regulated by State law to the extent of regulating the practices of Respondent alleged in this complaint to be illegal." (R. page 6)

As Respondent sees it the sole question in this case is whether the State laws in the various States in which Respondent does business adequately and effectively regulate the acts of Respondent.

UNDER THE McCARRAN-FERGUSON ACT THE POWER OF THE STATE TO REGULATE THE BUSINESS OF INSURANCE COMES INTO BEING BY THE ENACTMENT OF THE REGULATORY STATE LAW, AND SUCH POWER IS NOT SUSPENDED DURING THE INTERIM BETWEEN THE ENACTMENT OF THE STATE LAW AND THE ENFORCEMENT OF SUCH LAW, NOR IS IT DEPENDENT UPON THE EXTENT TO WHICH SUCH STATE LAW IS ACTUALLY ENFORCED. IF SUCH STATE LAWS ARE NOT ENFORCED TO THE SATISFACTION OF THE CONGRESS, THE CONGRESS HAS THE POWER AT ANY

TIME TO OCCUPY THE FIELD AND VEST THE REGULATORY POWER IN A FEDERAL AGENCY TO THE EXCLUSION OF REGULATION BY THE SEVERAL STATES.

Respondent submits that the plain language of the McCarran-Ferguson Act, including the positive expression of the Congressional intent, sustains the soundness of the above proposition. First, there is the positive statement that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to such regulation or taxation. Second, that the business of insurance and every person engaged therein shall be subject to the laws of the several States. Third, that no act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance unless such Act of Congress specifically relates to the business of insurance. And, finally, that the Federal Trade Commission Act shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

It is obvious that Congress throughout was referring to legislative acts of the States and was not limiting or measuring the power of the States by the perfection with which such laws would be enforced. Petitioner throughout its brief takes the position that there is no regulation of the business by the States

except to the extent that the States enforce their regulatory laws.

Respondent submits that not only is such position unsound but it would be completely impracticable to apply or carry out the position taken. Petitioner throughout its brief admits that it has no jurisdiction if the State laws are effectively enforced. Who would determine whether the State laws were or were not effectively enforced? Would it be within the power of the Petitioner to determine its jurisdiction by determining that California, for instance, was not effectively enforcing its regulatory statute? Or would the courts of California have the power to oust the jurisdiction of Petitioner upon the ground that according to the opinion of the Supreme Court of California the State regulatory law was being effectively enforced. Or, in a particular case, after the Petitioner had assumed jurisdiction upon the ground that the State of California was not effectively enforcing its regulatory statute suppose the State of California during the pendency of the case began more vigorously to enforce its regulatory statute. The jurisdiction of Petitioner is not determined as of the filing of a complaint or as of the hearing thereon, but is measured as of the date of entering its final order. [**United Corporation vs Federal Trade Commission,** (1940), 110 Fed. (2) 473; **Chamber of Commerce of Minneapolis vs Federal Trade Commission,** (1926), 13 Fed. (2) 673] Would Petitioner have the power to determine whether the more vigorous enforcement by the

State of California of its regulatory statute had ousted its jurisdiction which it had assumed with the filing of the complaint?

If Petitioner's position is sound it is conceivable that in every case before it there would be the issue of jurisdiction not based on any rule of law but based on the issue of fact as to whether the State regulatory statutes were being effectively enforced.

In a footnote, page 11 Petitioner's brief, it is stated that 36 States have enacted the Model Bill relating to insurance, that 8 others had statutes essentially the same in effect as the Model Bill. Since that time Mississippi has enacted the Model Bill. So, there are at least 45 States which have enacted adequate regulatory statutes.

Suppose Petitioner filed a complaint against an insurance company which was doing business in all of these 45 States and Petitioner charged that such insurance company was guilty of fraudulent and deceptive advertising. If Petitioner's position is sound that it has jurisdiction unless the State is effectively enforcing its statute, the issue of fact would be raised as to each of the 45 States, and the validity of Petitioner's cease and desist order would be dependent upon how this issue of fact as to each State were finally determined. This issue of fact would have to be determined in every case in which Petitioner filed a complaint and the number of issues of fact to be determined would depend on the number of States

in which the Respondent was doing business. And in every case as to every State, after Petitioner had assumed jurisdiction, such jurisdiction would be subject to be ousted if it could be shown that since the complaint was filed certain States had become more vigorous in the enforcement of their statutes.

It seems to Respondent that it is too plain for argument that Congress never intended to make the power of the several States to regulate the business of insurance dependent upon the Federal Trade Commission's determination of the extent to which the several States were enforcing their regulatory statutes.

Respondent submits that the Congress and not the Federal Trade Commission is vested with the power to determine whether the State regulation of the business of insurance is adequate and effective.

In the report of the Senate Committee on the Judiciary, this brief infra, page 31, the Committee expresses the opinion that considerable study should be given of the question of need, if any, of further Federal legislation. More than ten years have passed since such report and there has been no further Federal legislation on the subject. Respondent submits that this indicates that Congress is satisfied with the regulation by the several States.

Now, replying specifically to certain portions of Petitioner's argument.

Under A, Petitioner's brief, page 22, Petitioner states:

"Nor is the Commission proceeding against insurance advertising which has been approved formally or informally by State authorities. **** And no one has even intimated that any of the States actually had applied its regulatory statute to the advertising practices of the two companies involved here." (Brief, page 22)

In the official report of the proceedings before the Federal Trade Commission, page 116, appears the following brought out by the attorneys for Petitioner from the witness W. C. Murphy:

"Q. Now, has such advertising been approved by the Insurance Commissioners of the various states?

"A. Yes, sir, where the regulations are such.

"Q. Has such advertising been submitted to the Commissioners of all states where you do business?

"A. Well, I would say yes; there are some states that won't look at it, that is, they don't have any particular —

"Q. Which states are those?

"A. I don't recall offhand. A copy of our application must be submitted and all this sales literature, a copy of it in all cases must be submitted to the states and approved and, if we get a kickback on some of our advertising, then we change it.

"Q. Now, do you know what advertising that was?

"A. No, I don't.

"Q. But, that has happened?

"A. Yes, sir. It was not actually a kickback, or criticism; it was just for clarification.

"Q. Well, asking you to change it.

"A. Well, maybe so." (Official Report 116-117)

Respondent did not ask that this testimony be included in the printed record because Respondent did not contemplate that Petitioner would make statements directly contrary to evidence which Petitioner itself developed.

Petitioner admits in its brief, at the top of page 23, that the Federal Trade Commission Act cannot be applied so as to override the state policy specifically expressed either in statutes or **administrative action.** How, then, can the Federal Trade Commission enter a cease and desist order as to advertising when the State in exercising its administrative action conceivably might reach the conclusion that the identical advertising sought to be prohibited by the Commission's cease and desist order was neither false, deceptive nor misleading?

Under B, page 23 of Petitioner's brief, and throughout the brief, Petitioner takes the position that in the absence of Federal regulation to fill the void there is a legal vacuum, a "no man's land" which is not effectively regulated either by the States or by the Federal government.

Respondent submits that the McCarran-Ferguson Act leaves no void, no legal vacuum, nor is there any "no man's land". The so-called Model Codes adopted by the States, one of which is set out as the Appendix

to Petitioner's brief, occupies the same field insofar as the business of insurance is concerned as that occupied by the Federal Trade Commission as to commerce in general, except that the State acts are much fuller and more in detail and leave much less to judicial construction than does the Federal Trade Commission Act. The McCarran-Ferguson Act makes the Federal Trade Commission Act applicable to the business of insurance only to the extent that such business is not regulated by State law. All of the States in which Respondent does business having enacted effective regulatory acts, there can be no void, no legal vacuum or "no man's land" insofar as this case is concerned.

In spite of the fact that this case and No. 435 have been consolidated for argument this case will, of course, be decided upon the record in this particular case. It is undisputed that all of the advertising matter complained of is sent from the home office in San Antonio, Texas, directly to agents in the several States in which Respondent is licensed to transact business. Each of the agents who receives the advertising matter is licensed to act as agent only in the State in which he resides. He never crosses State lines in presenting the advertising matter to prospects. No advertising matter is sent through the United States mails directly to prospects and there is no newspaper, magazine, radio or television advertising whatsoever. The only interstate movement of advertising matter is from the home office to its agents. Up to this point it

is obvious that irrespective of what the advertising matter contains the mere placing of this advertising matter in bulk in the hands of the agents would not induce any prospect to purchase the insurance. Every contact with prospects insofar as the advertising matter is concerned occurs wholly within the boundaries of that particular State. The State statute in each State fully, expressly and in detail prohibits the disseminating or circulation of any false or misleading representations either orally or in writing. The Commissioner is given full power to examine and investigate into the affairs of every person engaged in the business of insurance in his State in order to determine whether such person has been or is engaged in any unfair method of competition or any unfair or deceptive act or practice. The Commissioner has full power of subpoena compelling the production of all documentary matter, and the Act gives the District Court the power to punish for contempt upon refusal. The Commissioner is given power to issue cease and desist orders equal in scope to the cease and desist orders which the Federal Trade Commission has power to issue. A violation of a cease and desist order is punishable by a very substantial fine and it is provided that such violation shall also be sufficient ground for the revocation by the Commissioner of certificate of authority of the insurance company to do business in the State and for the revocation of license of such agent. (Appendix, Petitioner's brief, page 67; Appendix "A", Respondent's brief, page 33)

Respondent therefore submits that all of the acts of which Petitioner has made complaint against Respondent in this case may be effectively prevented by the Insurance Commissioner in every State in which Respondent is licensed to do business under the adequate provisions of the regulatory statutes in each of said States.

As stated by the Court of Appeals for the 5th Circuit,

> "If there is an 'irreducible area' of commission jurisdiction, we are of the firm conviction that the matter presented by the record before us is not within it." (R. 116)

Under C, Petitioner's brief, page 25, it is stated:

> "Until the State authorities act to apply this common policy to the same transaction there would seem to be no substantial reason why the Federal and State Governments should not both have jurisdiction."

Respondent submits that this statement is in the face of the plain and clear statement of Congressional policy as expressed in the McCarran-Ferguson Act, and this Court's construction of that Act, in **Prudential vs Benjamin,** where the Court stated:

> "Obviously Congress' purpose was, broadly, to give support to the existing and future State systems for regulating and taxing the business of insurance. This was done in two ways, one was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise ex-

> pressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued State regulation and taxation of this business is in the public interest and that the business and all who engaged in it 'shall be subject to' the laws of the several States in these respects."

Prior to Southeastern the States had full power of exclusive control certainly as to everything complained of in this case against Respondent, and such control was expressly continued by the McCarran Act.

Referring to D, Petitioner's brief, page 27, respondent does not agree with Petitioner's statement "apart from stating the purpose 'to secure adequate regulations and control of the insurance business' the House and Senate reports on the Bill contain nothing dealing directly with the question presented here."

We quote the following excerpts from such report:

> "From its beginning the business of insurance has been regarded as a local matter to be subject to and regulated by the laws of the several States. This view has been fostered and augmented by decisions of the United States Supreme Court for a period of more than 75 years leading to the generally accepted doctrine that the business of insurance was not subject to Federal law."

And, further,

> "Your Committee believes there is urgent need for an immediate expression of policy by

> the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal, to comply with State tax laws as well as with other State regulations on the ground that to do so when such laws may subsequently be held unconstitutional in keeping with the precedent smashing decision in the Southeastern Underwriters case will subject insurance executives to both civil and criminal actions for misappropriations of company funds.
>
> "The Committee has therefore given immediate consideration to S. 340, together with a similar measure, HR 1973, so that the several States may know that the Congress desires to protect the continued regulation and the taxation of the business of insurance by the several States and thus enable insurance companies to comply with State laws."

And, further,

> "Enactment of this Bill will (1) remove existing doubts as to the right of the States to regulate and tax the business of insurance, and (2) to secure more adequate regulation of such business." (House Report No. 143, February 13, 1945, U.S. Code Congressional Service, 79th Congress, First Session, 1945, pages 670-673.)

On page 28, Petitioner's brief, it is stated that at the end of 1956 there were 115,949,000 persons in this country with hospital expense protection; there were 101,325,000 with surgical expense protection, and 64,891,000 with regular medical expense protection. Petitioner further states that taking note that the

phenomenal growth of this type of insurance had been accomplished in many instances by false and misleading advertising, that it had undertaken an active campaign to eliminate such practices from the channels of interstate commerce. It then states that since October, 1954, it has issued 41 complaints in this field. With over 115,000,000 people being served, for only 41 complaints to have been filed in 3-1/2 years, and 13 cease and desist orders having been issued, would certainly indicate either that there were not many instances of false and misleading advertising or that the Commission has failed miserably in undertaking an active program to eliminate such practices from the channels of interstate commerce. Respondent believes that Petitioner is not correct in its charge that the phenomenal growth of this type of insurance has been accomplished in many instances by false and misleading advertising, but if Petitioner should be correct in its statement, then its admission that so few complaints have been filed in 3-1/2 years, and only 13 cease and desist orders issued, certainly indicates that the Commission has not undertaken an active campaign or that it does not have sufficient facilities to conduct it, or both.

Petitioner makes the statement, on page 31 of its brief,

> "According to the two decisions Commission jurisdiction is automatically extinguished upon the mere enactment of such legislation; extinguished without regard to the fact that the transactions may, as a practical matter,

be beyond the scope of effective State legislation."

This statement is certainly not true insofar as this case is concerned, because the Court of Appeals for the 5th Circuit had no such question before it and made no such sweeping declaration. Under the facts of this case each State in which Respondent does business has the power to control with absolute effectiveness the advertising of Respondent which is complained of, and none of the transactions complained of is beyond the scope of effective State regulation.

After stating, one page 34 of the brief, that the practices by Respondent are not regulated by State law merely because of the enactment of general State legislation on the subject, Petitioner states, on page 35 of the brief, that in urging the correctness of this constuction Petitioner will first show that no conflict either statutory or administrative exists between the Commission's action and any State law; and second, that a contrary construction would create a regulatory "no man's land" which Congress could not have intended. Third, that the purpose of the McCarran-Ferguson Act was to remove Federal impediments to the execution of State policies and not to bar Federal action wholly consistent with such State policies; and fourth, that the legislative history of the McCarran-Ferguson Act confirms this construction.

Taking these up in order—

A (Brief, page 35). Petitioner states that it is not proceeding against insurance advertisement which

has been approved formally or informally by State authorities. (See testimony of Murphy, this brief, page 14)

At the top of page 36 of the brief Petitioner again takes the position that there is a jurisdictional void. Respondent submits that the McCarran Act leaves no jurisdictional void. The States are given exclusive jurisdiction insofar as their statutes regulate the business, and if there is any area which is unregulated, to that extent, and to that extent only, under the proviso in the McCarran-Ferguson Act does the Federal Trade Commission have jurisdiction.

Respondent asserts that the position taken by Petitioner throughout to the effect that no matter how completely the regulatory statutes of the State cover the situation, that nevertheless the jurisdiction of the Federal Trade Commission attaches until the States enforce all violations of their legislative acts, is obviously unsound. Does Petitioner take the position that it will ride herd on all of the 48 states and that whenever a State fails to enforce its regulatory law according to Petitioner's idea as to how it should be enforced that this will give Petitioner jurisdiction and it will step in and enforce the Federal Trade Commission Act according to Petitioner's notion as to how it should be enforced? It seems to Respondent too obvious for argument that when, as in this case, the regulatory State statutes in every State where Respondent is permitted to do business are as complete and comprehensive as the Federal Trade Commission

Act itself, there is no area left for the exercise of jurisdiction by Petitioner because Petitioner's jurisdiction in the field is only "to the extent that such business is not regulated by State law."

B. (Brief, page 41) Under this heading Petitioner again attempts to ride its pet hobby that if Federal regulations are not exercised in this case there will be an unfilled void, a legal vacuum, a "no man's land". In answer Respondent can but reiterate that in this case there is no void, no legal vacuum, nor is there a "no man's land." The State statutes in every State in which Respondent does business adequately define false and deceptive advertising, adequately provide for its prevention, and as applied to this case there is complete effectiveness because there being no direct mail advertising, no newspaper, magazine, radio or television advertising, and the advertising in each State being disseminated by local agents in that State and entirely within the borders of that state, any violation of such regulatory statute can promptly be stopped by the issuance of a cease and desist order. There also hangs over the head of the insurance company and its agents within the State the cancellation of all licenses to operate, with the additional penalty of heavy fines.

In this case, therefore, there is no extent to which that part of the business of insurance involved in this case is not regulated by State law and, furthermore, there is no extent to which it is not effectively regulated by State law. In this case there can be no

occasion for any State to regulate the advertising practices of Respondent beyond the borders of that particular State. Therefore, Petitioner's pronouncement, brief page 47, "that the authorities of the state of origin can hardly be expected to devote their necessarily limited financial and man power resources to the investigation and prosecution of misrepresentations made to the citizens of the other 47 states", has no bearing whatsoever on this case.

Neither would there be any occasion for a policyholder in any State to seek redress only in some distant State where the insurer is incorporated. Respondent is subject to the jurisdiction of the courts of each State in which it is licensed to do business and the policyholders may obtain complete redress against Respondent in the State of such policyholder's residence.

In the second paragraph, brief page 47, Petitioner states that the problem is even more acute where an insurance company employs no local agent and has no office or assets within the State. That in those circumstances there would seem to be no way in which the State can adequately protect its citizens from false advertising disseminated from out of the state points through the media of the United States mail, newspapers, magazines, radio or television.

As already stated herein, such a hypothetical case has no application whatsoever to the facts of this case.

C. (Brief, page 49) Under this heading Petitioner rides another one of its hobbies which is stated and restated throughout the brief, viz., "The basic distinction is between (1) State insurance laws sanctioning what Federal law forbids, and (2) State insurance laws prohibiting what Federal law forbids."

Petitioner takes the position that it has no jurisdiction under (1) but that it has concurrent jurisdiction under (2). Respondent submits that this position is not sound. Logic would require Petitioner to concede that if the States have full power of regulation and control when their legislative acts sanction what the Federal laws forbid that the States would have the same power of regulation and control when the States' construction of an act is different from the construction of a similar legislative act by the Federal agency. Respondent submits that it is unsound to argue that the Federal Trade Commission should be allowed to regulate the insurance business contrary to the McCarran Act simply upon Petitioner's improbable assumption that the interpretation of the 48 Insurance Commissioners of the advertising matter would be the same as that of Petitioner.

In reaching the conclusion that the allegations of the complaint were not sustained, the Trial Examiner recognized that the brochures were presented by agents in face to face conferences with prospects. He therefore gave reasonable effect to the provisions in the brochures in bold face type to the effect that the benefits are subject to the terms of the policy, are

subject to the limitations of the policy, and other similar provisions, and also assumed that the negotiations would be between persons of average intelligence.

The Trial Examiner also took into consideration the fact that although prior to the hearing the Petitioner's attorneys had access to all of the records of Respondent, including all of the claim files, and in spite of the fact that many thousands of policies had been sold, that not one person testified that there had ever been any deception in the sale of a single policy. The Petitioner's position is thus stated in its brief in the court below, page 9:

> "The Commission was also concerned with the meaning conveyed to the ignorant, the unthinking, and the credulous who in making purchases do not stop and analyze but are governed by appearance and general impressions. It may be that there was no intention to mislead and that only the careless or incompetent could be misled. But if the Commission having discretion to deal with these matters thinks it best to insist on a form of advertising clear enough so that in the words of the Prophet Isaiah 'Wayfaring men though fools should not err therein' it is not for the Courts to revise their judgment."

Respondent submits that it is entirely conceivable that the States in regulating advertising matter might agree with the more reasonable view of this matter taken by the Trial Examiner than with the extreme view taken by the Commission. That the States in regulating advertising matter might take into con-

sideration the use of the advertising matter and the type of persons to whom it is submitted and that where the advertising is presented only in personal conferences with prospects that these prospects are not wayfaring men who are fools but are persons who are presumed to have some intelligence and understanding, and that the States would not feel justified in meticulously dissecting the advertising matter in the attempt to reveal some minor omission which would not enter into the impression created upon a reasonably prudent business man such as the prospects interviewed by Respondent's agents are presumed to be.

At the top of page 50 of the brief Petitioner cites two cases involving the Federal Power Act and states that both of these cases involve a statutory provision strikingly similar to the McCarran Act.

Respondent submits that the provisions of the Federal Power Act referred to and Section 2(b) of the McCarran Act out of their context might have some similarity, but in their context they are about as strikingly dissimilar as any two provisions could be. There is a declaration of the Congressional policy in both the McCarran Act and the Federal Power Act. In the McCarran Act it is stated, "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the

several States." (U.S. Code, Title 15, Section 1011) In the Federal Power Act it is stated: "It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is effected with a public interest and that Federal regulation of matters relating to generation to the extent provided in Sections 824-825 (r) of this Title and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest." (U.S. Code, Title 16, Section 824).

The marked dissimilarity in the two Acts is that in the McCarran Act the "clear and specific grant of jurisdiction" is to the States and in the Federal Power Act the "clear and specific grant of jurisdiction" is to the Federal Government through the Federal Power Commission.

In the McCarran Act the exception in favor of the Federal Trade Commission is from the grant of jurisdiction to the States and in the Federal Power Act the exception to the States is from the grant of jurisdiction to the Federal Power Commission.

When we consider this fundamental difference in the two Acts the two cases cited by Petitioner, if they have any bearing at all upon the issues of this case, tend to sustain the position of Respondent rather than the position taken by Petitioner.

D. (Brief, page 55) In reply to this portion of Petitioner's brief Respondent takes the position that

there is no ambiguity in the McCarran Act. As stated by this Court in the **Prudential** case,

> "It is not necessary to spend much time in interpreting the McCarran Act **** Obviously Congress' purpose was broadly to give support to the existing and future State systems for regulating and taxing the business of insurance. This was done in two ways, one was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued State regulation and taxation of this business is in the public interest and that this business and all who engaged in it 'shall be subject to' the laws of the several States in these respects."

It seems to Respondent that the canon of construction set out in **Ex Parte Collett,** 337 U.S. 55, 61, applies with full force to the McCarran Act. In the case cited this court stated:

> "Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of Sec. 1404(a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inferences in every direction.' Gemsco, Inc., v. Walling, 324 U.S. 244, 260, 89 L. Ed. 921, 933, 65 S. Ct. 605 (1945). This canon of construction has received consistent adherence in our decisions."

However, Petitioner having gone into this subject at some length, Respondent calls the Court's attention to the following:

The McCarran Act was amended on July 25, 1947, by merely extending the so-called moratorium from January 1, 1948, to June 30, 1948. On July 1, 1947, the Senate Committee on the Judiciary, being the Committee having in charge the proposed amendment, made the following statement:

> "This bill extends the so-called moratorium provision of Public Law 15 of the Seventy-ninth Congress from January 1, 1948, until June 30, 1948. The committee is informed and is satisfied that an effort has been exerted by the insurance industry, the insurance commissioners, and the States in dealing with the matter of State regulation. However, the committee recognizes that the problems have not been solved, and is of the opinion that an extension of the so-called moratorium should be granted in order to provide the Congress an additional time to examine into the situation more completely than it has been able to do during the present session. As the committee is of the opinion that considerable study should be given to this matter, and the question of the need, if any, of further Federal legislation it would appear most desirable to extend this moratorium period an additional 6 months, thereby giving the Congress a reasonable time to examine the developments that have taken place in this field during and immediately subsequent to the meetings of the 1947 State Legislatures." (U.S. Code Congressional Service, 80th Congress, First Session 1947, page 1359)

More than ten years have passed since the Senate Committee on the Judiciary stated that they would determine if any further Federal legislation on this question would be needed. Respondent submits that the fact that no further Federal legislation has been enacted in the ten year period is quite conclusive on the question that the Congress is satisfied with the unfair practice and competition acts passed by the State legislatures and that in the opinion of the Congress such State legislation covers adequately the control of the insurance industry insofar as the dissemination of false and deceptive advertising matter is concerned.

CONCLUSION

The Legislatures of all of the States in which Respondent has permit to do business having enacted adequate regulatory laws, and all of the acts complained of by Petitioner against Respondent being subject to complete State control, Respondent respectfully submits that the judgment of the Court of Appeals for the Fifth Circuit in this case be in all things affirmed.

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"Appendix 'A'"

TENNESSEE

Article XIX. Unfair Methods of Competition and Deceptive Acts and Practices.

SECTION.

6459.56. Declaration of purpose.
6459.57. Definitions.
6459.58. Unfair methods of competition or unfair and deceptive acts or practices prohibited.
6459.59. Unfair methods of competition and unfair or deceptive acts or practices defined.
6459.60. Power of commissioner.
6459.61. Hearings, witnesses, appearances, production of books and service of process.
6459.62. Cease and desist orders and modifications thereof.
6459.63. Judicial review of cease and desist orders.
6459.64. Procedures as to unfair methods of competition and unfair or deceptive acts or practices which are not defined.
6459.65. Judicial review by intervener.
6459.66. Penalty.
6459.67. Provisions of act additional to existing law.
6459.68. Immunity from prosecution.
6459.69. Separability provision.

§ **6459.56. Declaration of purpose.**—The purpose of this act is to regulate trade practices in the business of insurance in accordance with the intent of the Congress of the United States as expressed in the act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state which con-

stitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. (1947, ch. 202, sec. 1.)

§ **6459.57. Definitions.**—When used in this act:

(a) "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters.

(b) "Commissioner" shall mean the commissioner of insurance and banking of this state. (1947, ch. 202, sec. 2.)

§ **6459.58. Unfair methods of competition or unfair and deceptive acts or practices prohibited.**—No person shall engage in this state in any trade practice which is defined in this act as, or determined pursuant to this act to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance. (1947, ch. 202, sec. 3.)

§ **6459.59. Unfair methods of competition and unfair or deceptive acts or practices defined.**—(a) The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(1) Misrepresentations and False Advertising of Policy Contracts.—Making, issuing, circulating, or

causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

(2) False Information and Advertising Generally. —Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(3) Defamation.—Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or maliciously derogatory to the financial condition of an insurer, and which is calculated to injure any person engaged in the business of insurance.

(4) Boycott, Coercion and Intimidation.—(a) Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of the business of insurance, or (b) by any act of boycott, coercion or intimidation monopolizing or attempting to monopolize any part of the business of insurance. (c) Nothing in (b) of this part (4) shall be interpreted as defining or determining as an unfair method of competition or an unfair or deceptive act or practice in the business of insurance any act of boycott, coercion or intimidation on the part of any person, unless such act is committed in connection with an intention on the part of such person to monopolize, or attempt to monopolize, any material part of the business of insurance; provided that no insurance company shall be held to have violated the provisions of (b) of this part (4), because of any act of an agent of said company, which act has not been authorized or approved or acquiesced in by the company.

(5) False Financial Statements—Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, wilfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

(6) Stock Operations and Advisory Board Contracts.—Issuing or delivering or permitting agents, officers, or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance.

(7) Unfair Discrimination.—(a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the

rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract. (b) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(8) Rebates.—(a) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not speci-

fied in the contract. (b) Nothing in clause 7 or paragraph (a) of clause 8 of this subsection shall be construed as including within the definition of discrimination or rebates any of the following practices: (i) in the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders; (ii) in the case of life insurance policies, or accident and health policies, issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expense; (iii) readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

(9) Requiring Insurance from Particular Company, etc., as Condition Precedent to Loan.—Requiring as a condition precedent to lending money upon the security of a mortgage or lien upon real or personal property, that the borrower for whom such financing is arranged, or the owner of the property, negotiate any policy of insurance covering such real

or personal property through a particular insurance agent or broker, or insurance company; provided, however that this provision shall not prevent the exercise by any lender or lien-holder or mortgagee of its right to approve or disapprove, for reasons affecting solvency or other proper reasons, of the insurance company selected by the owner or borrower to underwrite the insurance; and provided, further, that no lending company shall be held to have violated the provisions of this paragraph (9), because of any act of an agent or loan correspondent of said company, of which act the lending company does not have actual knowledge, and which act has not been authorized, approved or acquiesced in by the lending company.

(10) Acquisition of Stock Lessening Competition. —Acquisition, by a domestic insurance company of the State of Tennessee, of stock or other share capital of another such company engaged in an insurance business of the same type or class, where the effect of such acquisition is to substantially lessen competition between the two companies, or to restrain commerce, or create a monopoly. This paragraph shall not apply to companies purchasing such stock solely for investment and not using the same by voting, or otherwise, to bring about, or attempt to bring about, the substantial lessening of competition.

(11) Holding Office as Director of Two or More Companies.—Holding office, at the same time as a director of two or more domestic insurance companies

of the State of Tennessee, engaged in the same type or class of insurance business, by any individual, if such companies are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any anti-trust law of the United States or of the State of Tennessee. (1947, ch. 202, sec. 4.)

§ **6459.60. Power of commissioner.** — The commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by section 3 [§ 6459.58] of this act. (1947, ch. 202, sec. 5.)

§ **6459.61. Hearings, witnesses, appearances, production of books and service of process.** — (a) Whenever the commissioner shall have reason to believe that any such person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice defined in section 4 [§ 6459.59] and that a proceeding by him in respect thereto would be to the interest of the public, he shall issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than thirty (30) days after the date of the service thereof.

(b) At the time and place fixed for such hearing, such person shall have an opportunity to be heard and to show cause why an order should not be made by the commissioner requiring such person to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person.

(c) Nothing contained in this act shall require the observance at any such hearing of formal rules of pleading or evidence.

(d) The commissioner, upon such hearing, may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence, or other documents which he deems relevant to the inquiry. The commissioner, upon such hearing, may and upon the request of any party shall, cause to be made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the commissioner shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the chancery court of Davidson County or the county where such party resides, on application of the commissioner,

may issue an order requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof.

(e) Statements of charges, notices, orders, and other processes of the commissioner under this act may be served by anyone duly authorized by the commissioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by such statement, notice, order, or other process at his or its residence or principal office or place of business. The verified return by the person so serving such statement, notice, order, or other process, setting forth the manner of such service, shall be proof of the same, and the return postcard receipt for such statement, notice, order, or other process, registered and mailed as aforesaid, shall be proof of the service of the same. (1947, ch. 202, sec. 6.)

§ **6459.62. Cease and desist orders and modifications thereof.** — (a) If, after such hearing, the commissioner shall determine that the method of competition or the act or practice in question is defined in section 4 [§ 6459.59] and that the person complained of has engaged in such method of competition, act or practice in violation of this act, he shall reduce his findings to writing and shall issue and cause to be served upon the person charged with the violation an order requiring such person to cease and desist from

engaging in such method of competition, act or practice.

(b) Until the expiration of the time allowed under section 8, subsection (a) [§ 6459.63] of this act for filing a petition for review by writ of certiorari if no such petition has been duly filed within such time or, if a petition for writ of certiorari has been filed within such time, then until the transcript of the record in the proceeding has been filed in the chancery or circuit court, as hereinafter provided, the commissioner may at any time, upon such notice and in such manner as he shall deem proper, modify or set aside in whole or in part any order issued by him under this section.

(c) After the expiration of the time allowed for filing such a petition for writ of certiorari, if no such petition has been duly filed within such time, the commissioner may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any order issued by him under this section, whenever in his opinion conditions of fact or of law have so changed as to require such action or if the public interest shall so require. (1947, ch. 202, sec. 7.)

§ 6459.63. Judicial review of cease and desist orders.—(a) Any person required by an order of the commissioner under section 7 [§ 6459.62] to cease and desist from engaging in any unfair method of competition or any unfair or deceptive act or practice de-

fined in section 4 [§ 6459.59] may obtain a review of such order in the chancery or circuit court of the county in which the defendant resides, or conducts his business, in the manner provided in sections 9008 through 9018 of the 1932 Code of Tennessee.

(b) To the extent that the order of the commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner, the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper. The commissioner may modify his findings of fact, or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(c) A cease and desist order issued by the commissioner under section 7 [§ 6459.62] shall become final;

(1) Upon the expiration of the time allowed for filing a petition for writ of certiorari, if no such peti-

tion has been duly filed within such time; except that the commissioner may thereafter modify or set aside his order to the extent provided in section 7(b) [§ 6459.62]; or

(2) Upon the final decision of the court if the court directs that the order of the commissioner be affirmed or the petition for review dismissed.

(d) No order of the commissioner under this act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state. (1947, ch. 202, sec. 8.)

§ 6459.64. Procedure as to unfair methods of competition and unfair or deceptive acts or practices which are not defined.—(a) Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of such business which is not defined in section 4 [§ 6459.59], that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than thirty (30) days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the

hearings provided for in section 6 [§ 6459.61]. The commissioner shall, after such hearing, make a report in writing in which he shall state his findings as to the facts, and he shall serve a copy thereof upon such person.

(b) If such report charges a violation of this act and if such method of competition, act or practice has not been discontinued, the commissioner may, through the attorney general of this state, at any time after thirty (30) days after the service of such report cause a petition to be filed in the chancery or circuit court of this state within the district wherein the person resides or has his principal place of business, to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public pendente lite. To the extent that the order of the commissioner is affirmed, the court shall thereupon issue its order commanding obedience to the terms of such order of the commissioner.

(c) A transcript of the proceedings before the commissioner, including all evidence taken and the report and findings, shall be filed with such petition. If either party shall apply to the court for leave to adduce additional evidence and shall show, to the satisfaction of the court, that such additional evidence is material and there were reasonable grounds for the

failure to adduce such evidence in the proceeding before the commissioner, the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper. The commissioner may modify his findings of fact or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings with the return of such additional evidence.

(d) If the court finds that the method of competition complained of is unfair or that the act or practice complained of is unfair or deceptive, that the proceeding by the commissioner with respect thereto is to the interest of the public and that the findings of the commissioner are supported by the preponderance of the evidence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice.

(e) Proceedings under this section 9 shall conform as nearly as possible to the procedure outlined and established by sections 9008 through 9018 of the 1932 Code of Tennessee. (1947, ch. 202, sec. 9.)

§ **6459.65. Judicial review by intervener.**—If the report of the commissioner does not charge a violation of this act, then any intervener in the proceedings may within sixty (60) days after the service of such report, cause a petition for writ of certiorari to be filed in the chancery or circuit court of Davidson

County for a review of such report, as provided in sections 9008 through 9018 of the 1932 Code of Tennessee. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding such report of the commissioner, constitutes a violation of this act. (1947, ch. 202, sec. 10.)

§ **6459.66. Penalty**—Any person who violates a cease and desist order of the commissioner under section 7 [§ 6459.62], after it has become final, and while such order is in effect, shall forfeit and pay to the State of Tennessee a sum not to exceed five thousand ($5,000.00) dollars for each violation, which may be recovered in a civil action. In determining the amount of the penalty the question of whether the violation was wilful shall be taken into consideration. Nothing herein shall be construed as limiting a court in enforcing its own orders. (1947, ch. 202, sec. 11.)

§ **6459.67. Provisions of act additional to existing law.**—The powers vested in the commissioner by this act, shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive. Nothing in this act shall be construed as amending or repealing any

statute of the State of Tennessee now in effect. (1947, ch. 202, sec. 12.)

§ **6459.68. Immunity from prosecution.** — If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and shall notwithstanding be directed to give such testimony or produce such evidence, he must none the less comply with such direction, but he shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence pursuant thereto, and no testimony so given or evidence produced shall be received against him upon any criminal action, investigation or proceeding, provided, however, that no such individual so testifying shall be exempt from prosecution or punishment for any perjury committed by him while so testifying and the testimony or evidence so given or produced shall be admissible against him upon any criminal action, investigation or proceeding concerning such perjury, nor shall he be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the insurance law of this state. Any such individual may execute, acknowledge and file in the office of the commissioner a statement expressly waiving such immu-

nity or privilege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise; and if so received or produced such individual shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced. (1947, ch. 202, sec. 13.)

§ **6459.69. Separability provision.** — If any provision of this act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby. (1947, ch. 202, sec. 14.)